UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

PACIFIC BELL TELEPHONE COMPANY[1]/

Employer

and Case 31-UC-300

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER DISMISSING PETITION

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. [2]/

3. The parties stipulated and I hereby find that the two labor organizations involved herein, Communications Workers of America, AFL-CIO ("CWA") and the Intervenor, Telecommunications International Union, Local 103 ("TIU") are labor organizations within the meaning of Section 2(5) of the Act. TIU is an Intervenor in this proceeding based upon its collective bargaining agreement with the Employer, the term of which expires in 2004.

4. The Petitioner, CWA, proposes to clarify its current bargaining unit to include residential service representatives and staff associates that historically have been represented by the Intervenor, TIU. On the face of and attachment to its petition, CWA described its current and proposed unit solely in terms of those two classifications. At hearing, the Petitioner amended its petition to reflect that it represents an Employer-wide unit, which is correctly and fully described in its current collective bargaining agreement, and that it seeks to accrete all employees represented by TIU to this unit.[3]/

BACKGROUND

The Employer and CWA have been signatory to successive collective bargaining agreements through the years. The term of the extant agreement between the Employer and CWA is from February 1, 2001 through April 2004. The current CWA collective bargaining

---

[1]/ The name of the Employer appears as corrected at hearing. I note that the record reflects that the Employer is alternatively known as SBC Pacific Bell; however, no formal amendment to reflect this corporate name was made on the record.

[2]/ The Employer, Pacific Bell Telephone Company, is a California corporation, with places of business located throughout the State of California. Therein, its principal place of business is located in San Ramon, California. The Employer provides telephone services throughout California. Annually, the Employer's gross revenues exceed $100,000. Moreover, in the course of its business operations the Employer purchases and receives goods valued in excess of $50,000 directly from firms located outside of California. Thus, the parties stipulated and I find that the Employer meets the Board's discretionary, as well as its statutory, jurisdictional standard. *Siemons Mailing Service*, 122 NLRB 81(1958); *Sioux Valley Empire Elec. Assn*., 122 NLRB 394 (1958).

[3]/ As discussed below, TIU argues that, on its face and as amended, CWA's petition is procedurally flawed and therefore must be dismissed.

agreement covers a bargaining unit comprised of more than 47,000 employees in jobs in many different classifications, ranging from analyst to video installer, throughout California and Nevada. Included among this large unit of workers are approximately 5,000 residential service representatives and staff associates. Over the years, CWA has typically organized the Employer's residential service representatives or staff associates working at a specific facility or in a geographic district. When a Board certification issued wherein CWA was designated the Section 9(a) representative for a particular facility or district, by mutual agreement, the parties would then fold the newly certified group into the larger previously existing unit described above.

Since 1979, TIU has represented a significantly smaller bargaining unit of the Employer's employees who work in northern California. The most recent collective bargaining agreement between TIU and the Employer is, by its terms, effective from August 2001 through August 2004. TIU also organized on a facility-by-facility basis with the Employer agreeing to accrete all subsequently certified units into the original unit. Historically, the TIU-represented unit has been comprised of far fewer job classifications than the CWA-represented unit but has always included residential service representatives and staff associates. At the time of hearing, the TIU-represented unit consisted of about 500 employees in five offices located in San Jose, Oakland, Fresno, Sacramento and Rohnert Park. Notwithstanding a unit description including seven classifications, for at least the last four years, the TIU-represented unit has consisted of only residential service representatives and staff associates, 98 percent working in the former classification.

Over the years, the Employer has consolidated, expanded, diversified, renamed, regrouped and reconfigured the residential service representatives and to a lesser extent the staff

associates.[4]/ However, by and large, their duties have remained the same: they are responsible for processing residential customers' telephone orders and bills. Currently, all residential service representatives, both those represented by the CWA and those represented by TIU, are assigned to Consumer Market Groups (CMG) where billing and ordering functions for residential customers are performed interchangeably. Additionally, some residential service representatives have worked on premier accounts *i.e.*, larger and more lucrative residential accounts and in diverse market groups that serve non-English speakers.

NEW TECHNOLOGY

As noted above, residential service representatives were originally organized on the basis of their work location. These locations typically serviced geographically adjacent telephone prefixes or exchanges. Thus, in the past, a residential customer who wished to speak with a residential service representative would call the local number of the Employer's business office and connect with an employee whose "jurisdiction" was defined by the customer's telephone exchange. With the advent of more advanced technology, this structure began to change. Specifically, in about 1989 the Employer installed Automatic Call Distributor (ACD), a computer system that uses four switches, two in northern California (Sacramento and Santa Clara) and two in southern California (Los Angeles and Santa Ana), to route customers' calls across multiple physical sites.[5]/ Through the use of ACD, calls are routed throughout the system; the program is geared to enable customers to access a live voice as quickly as possible. Thus, for example, a customer's call that originates in and which would otherwise remain in Los

---

[4]/ The record reflects that staff associates perform clerical functions and are far fewer in number than the residential service representatives.

[5]/ The ACD system serves not only residential customers but also business customers, repair bureaus, collection centers etc.

Angeles may, due to increased caller volume, be bumped up to San Jose. Pre-recorded call screening (IVR) was implemented in 1991.

Under the ACD system calls are put through to a "team" via a computer "queue" or path. With regard to the residential sector, a team consists of residential service representatives each of whom may be working from different facilities in the same geographic area, but each of whom are doing the same type of work e.g., orders. A group of employees is an administrative subset of a team and consists of employees at a specific location. Operation of the ACD system does not pertain to employee groups because calls are distributed solely by teams. Groups exist mainly for office administration and management purposes.

Thus, a residential customer who has a question regarding his bill or order dials an "811" number. Facilitated by the ACD system, the customer's call is routed to a team; whereupon, the customer is connected with the representative who has been off the telephone for the longest time. The Employer determines its software program, and thereby charts how customers' calls will be distributed through the ACD system.

The Employer's technical director testified that the Employer has had the technological capacity to move calls freely around California since about 1991. However, not until 1997 did the Employer implement its last change to the ACD system, "TotalNet". TotalNet is an additional layer of call routing that permits the Employer to move calls throughout California across all four switches in order to determine where calls may be answered most quickly.[6]/ Before a call is released from pre-recorded call screening to a representative, TotalNet makes a decision as to where the call may be answered most quickly. TotalNet does not deliver the call to the representative; rather, it determines which of the four switches receives

the call. TotalNet may be programmed to keep the call in the home region unless the call would be answered faster somewhere else. This is not an overflow concept because it makes the decision before the customer has to wait.

When TotalNet was initially implemented, Pac Bell chose to route the calls only between each of the two regional switches as opposed to using the four switches statewide. Thereafter, the Employer elected to program TotalNet to provide the quickest response, which generally calls for statewide routing.[7]/ From the introduction of ACD and continuing under TotalNet through the present, the Employer has never distributed calls based upon the collective bargaining affiliation of its residential service representatives. Both the CWA and TIU units have received similar training with regard to ACD.

HISTORICAL OVERVIEW OF LABOR RELATIONS

The record reflects, and the parties agree, that historically there has been intense friction between CWA and TIU. There have been multiple representation elections where they have sought to represent the same group of employees. Several initial organizing drives and the RC elections that followed have pitted CWA against TIU. Also, over the years, the Employer has filed a number of RM petitions seeking to ascertain which of the two labor organizations represented certain employees. The record establishes that the Board has conducted representation elections pursuant to several such RM petitions. In such instances, when CWA prevailed the employees who had been represented by TIU would be absorbed into CWA's larger unit. In this manner, TIU has lost employee-members both in terms of job classifications

---

[6]/ The record establishes that ACD may be programmed to send calls across state lines. Indeed when there was a strike in northern California calls were routed to St. Louis.

[7]/ A single switch until about August 2001 handled the diverse market groups. Then, a second, small office was opened off another switch.

and at facilities. Nonetheless, since about 1993, as a result of a staffing agreement with the Employer, which was an outgrowth of an informal settlement of unfair labor practice charges, TIU has maintained a steady unit complement of 30 percent of the residential service representatives working in northern California.

In May 1997, with its continued survival at risk, TIU entered into a Memorandum of Understanding (MOU) with CWA. This MOU paved the way for a potential merger of the two labor organizations. The MOU provided for the conduct of two elections among the TIU-represented unit. First, in June 1997, TIU-represented employees were to vote whether they wished to have TIU become a temporarily chartered local of CWA. Following this preliminary vote, under the terms of the MOU, TIU would remain the sole bargaining representative for its unit until the second election, which was to be conducted on or about July 31, 1998. The result of the second election would determine finally whether the TIU-represented unit would permanently merge with CWA. Pursuant to the MOU, if the second vote were in favor of such merger, TIU would cease to exist; all TIU-represented workers would be represented by CWA.

The first vote took place as scheduled with a majority of the TIU-represented unit voting in favor of the temporary charter. The year's period between the two votes was to be a get-to-know one another time during which TIU would observe CWA's 1998 contract negotiations with the Employer. In the spring of 1998, TIU demanded that the Employer bargain with it for a successor collective bargaining agreement. TIU had not yet conducted the second vote. In response to TIU's bargaining request, in June 1998, the Employer filed an RM petition, wherein it claimed that in the absence of the second vote it was uncertain of its bargaining obligation to TIU. The Director of NLRB Region 32 dismissed this petition. Instead, in September 1998, a complaint issued against the Employer alleging that it had violated Section

8(a)(5) of the Act when it refused to bargain with TIU. Thereafter, the Board held that the Employer had violated the Act as alleged. In the summer of 2001 the United States Court of Appeals for the District of Columbia Circuit enforced the Board's order finding that the MOU had created no confusion regarding the Employer's bargaining obligation. Rather, TIU remained by the very terms of the MOU the 9(a) representative of the residential service representatives and staff associates.

Following numerous legal battles between the two Unions, the second vote was conducted among the TIU-represented employees in August 1999. They rejected the merger with CWA.

In 2001, each Union bargained separately for its successive agreement to cover the unit it represented. In this regard, the record reflects that during its most recent negotiations with the Employer, CWA stated that it wanted to accrete the TIU-represented residential service representatives to its large unit. According to the testimony of the Employer's negotiator, she would not discuss this issue with the CWA. Indeed, she characterized the issue as one that she did not consider seriously.

To reiterate: CWA's current collective bargaining agreement became effective February 5, 2001 and runs through April 1, 2004. TIU's current collective bargaining agreement became effective August 11, 2001 and runs through August 7, 2004. This UC petition was filed on May 8, 2001.

COMMUNITY OF INTEREST

Among the factors the Board examines in determining the propriety of accretion is community of interest. Here, the record establishes that there are many shared terms and

conditions of employment between the TIU-represented residential service representatives and the CWA-represented residential service representatives. All residential service representatives work in the Employer's Consumer Market Group (CMG). The CMG is the latest nomenclature for the services provided to residential consumers. This work has undergone multiple consolidations and changes (referred to by the Employer as "functionalization") through the years and perhaps just as many name changes.

As described above, TIU-represented residential service representatives work solely in northern California at five locations: San Jose, Sacramento, Oakland, Fresno and Rohnert Park. CWA-represented residential service representatives also work at these locations and many other locations throughout California and Nevada. Both groups of residential service representatives receive the same wages and benefits.[8]/ They receive the same training. The Employer has one human resources department for its employees which is responsible for contract negotiations and administration. Both groups of residential service representatives have the same duties. Their primary responsibilities entail responding to order and billing inquiries of residential customers. A large part of their work involves the sale of services offered by the Employer such as call waiting and caller identification. As such, they are engaged in offering services and solving customers' problems. The time residential service representatives spend on the line answering consumers' questions is referred to as "open key" work; the time they spend off line following up on consumers' questions is called "closed key." A "commitment" is the term used by the Employer to describe the work performed by a representative responsive to a customer's inquiry. Part of the representative's commitment may entail contacting repair or

---

[8]/ Due to different effective dates of the separate collective bargaining agreements, workers do not receive their contractual wage increases at the same time.

maintenance workers, most of whom are CWA-represented. Therefore, the TIU-represented residential service representative have historically interacted with employees outside their unit.

Commitments are usually performed at the same office that answered the customer's call. The Employer utilizes a "mosaic" method to distribute closed key work while a representative is waiting for a call. This mosaic method enables commitments to go outside the office and potentially outside the unit if that will result in more efficient processing. Thus, there have been isolated instances where a customer's call originates with a TIU-represented employee in northern California and a CWA-represented employee at another location fills the commitment.

The Employer supervisory hierarchy has five levels. The first level supervisor who works at the site is called a force manager. First level supervisors prepare employee evaluations. Second level supervisors are also based on site. Second level supervisors are primarily responsible for discipline and tone room monitoring.[9]/ Only in Sacramento do TIU-represented and CWA- represented residential service representative share first levels of supervision. In the San Jose office TIU and CWA-represented residential service representatives share second level supervision. Otherwise, common supervision over both TIU and CWA-represented residential service representatives occurs at the third level of supervision. From the standpoint of corporate structure, the Employer's offices are organized by geographic location called districts. The third level of supervision is in charge of each district. Therefore, regardless of union representation, at the third level there is always common supervision/management; however, third level supervisors do not work at the same sites as rank and file employees.

---

[9]/ The tone room permits supervisors and managers to monitor employees while they are on line with customers or with other employees.

Even though TIU and CWA-represented residential service representatives work at the same five locations, they usually do not work side-by-side. Rather, they typically work on different floors of the same building. Only in Sacramento do they work side-by-side. In San Jose they work in different areas of the same floor. Regardless, there is no dispute that they are performing the same work.

Each collective bargaining unit maintains separate seniority lists. There is also company -wide seniority. In such instances where a seniority contest must be resolved, for example for purposes of vacation, the Employer looks at the last four digits of the employees' social security number. But, under the Employer's Automated Upgrade Transfer System (AUTS), all employees may bid on posted positions and transfer among positions regardless of collective bargaining units. Once a transfer occurs from one bargaining unit to another, the employee is required to change union affiliation as mandated by the collective bargaining agreements. All such transfers are voluntary; there are no forced transfers. "Mini-transfers" are available to employees who wish to transfer to a different position and/or location in their district; by definition, mini-transfers do not entail change of unit or union affiliation.

Other than supervisory assignment, the record establishes the following differences in the units' terms and conditions: In their evaluations, TIU-represented employees are not rated for "adherence." Adherence reflects whether the employee is spending the correct amount of time on open key and closed key work--in other words following his or her schedule. Residential service representatives' calls are subject to supervisory monitoring. Contractually, under ordinary circumstances, such monitoring is limited to ten calls per month for each representative; however, TIU-represented employees know that only the first ten calls of the month may be monitored by a supervisor whereas CWA-represented employees are subject to

random monitoring (limited to ten calls) throughout the month. Furthermore, the two units have a different method of assigning Saturday work. For about one year in 1998, TIU-represented residential service representatives were granted greater leeway in selling the Employer's products or services to customers.

TIU's collective bargaining agreements have generally included a provision that calls for regularly scheduled common interest forums. At these common interest forums, committees from labor and management get together to discuss a variety of issues. A similar provision in CWA's collective bargaining agreement provides for meetings between the parties but only in the face of operational changes.

POSITIONS OF THE PARTIES ON THE PROPOSED UNIT CLARIFICATION

The position of the Employer is that it is neutral as to the issues in this proceeding. The Employer did not file a post-hearing brief.

CWA asserts that its petition for clarification is procedurally and substantively appropriate and should be granted. CWA first notes that current Board law tends to reject fragmentation of bargaining units in public utilities. In this regard, CWA asserts that the TIU-represented residential service representatives constitute an inappropriate unit. The position of CWA is based on two grounds: 1) The degree of the community of interest that the two groups of residential service representatives share, and; 2) the new computer technology that makes it impossible for the Employer to assign work by bargaining unit and/or employee location. Thus, CWA contends that, other than union affiliation, the 500 residential service representative represented by TIU have no separate identity from the 5000 residential service representatives represented by CWA. CWA also maintains that such continued fractionalization threatens labor stability. Procedurally, CWA maintains that its UC petition is timely and that it never waived its

right to represent the residential service representatives currently represented by TIU. In this regard CWA cites *WNYS-TV*, 239 NLRB 170 (1978), wherein the Board found that a union is not required to "risk economic warfare and/or possible unfair labor practices over this question" and permits the filing of a UC petition if the delay following the execution of the contract is "short". In *WNYS-TV*, the time elapsed between execution and filing was less than five weeks; here, the pertinent period is about eight weeks. Furthermore, CWA tacitly acknowledges that the new computer technology upon which its claim of changed circumstances is predicated is not so new. Nonetheless, CWA contends that the Board should not countenance an otherwise inappropriate unit just because the parties have been signatory to several successive collective bargaining agreements since ". . . certain customers' calls first migrated between TIU and CWA 'offices'."

TIU argues that, after the Board and the D.C. Circuit's decisions thwarted the Employer's attempted withdrawal of recognition, the UC petition is but another tactic designed to dismantle TIU by fiat.[10]/ In addition, TIU argues that the initial petition falsely represented the unit and therefore should have been dismissed without hearing. In this regard, TIU asserts that the petition originally sought accretion to a non-existent bargaining unit composed solely of CWA-represented residential service representatives. As such, TIU argues that the original petition sought severance and fragmentation of a historical unit followed by clarification of the historical TIU unit and its accretion to the newly "severed" unit. Procedurally, according to TIU, this contravenes Board authority and the historical single unit represented by CWA. On the third day of a six-day hearing, CWA amended its petition to describe the larger single unit.

---

[10]/ The Intervenor maintains that the purpose of these tactics is to override the free choice of their unit employees who, in the summer of 1999 in a secret ballot election conducted by the American Arbitration Association, voted overwhelmingly against the proposed merger with CWA.

Nonetheless, TIU contends that UC petition was untimely because it was initially filed and amended during the terms of both Unions' contracts with the Employer. Thereupon, TIU appears to be arguing that the "untimeliness" of the petition renders it defective on two bases: 1) A petition that seeks to include a historically excluded classification cannot be considered as a unit clarification but must be subject to the Board's rules governing representation elections. As such, TIU contends the instant petition is barred by traditional contract bar considerations; 2) Similarly, according to TIU, under time-honored Board law since the classification at issue has not undergone recent substantial changes, the instant petition is untimely.

Citing the Board's restrictive accretion policies and reluctance to deprive employees of their right to self-determination, TIU argues that in view of the historical exclusion and bargaining history of the TIU-represented residential service representatives UC petition must be dismissed. Lastly, TIU contends that, because the unit is a described by general classification and location as opposed to a functional description of the work performed, accretion is inappropriate. See *Archer Daniels Midland Co*., 333 NLRB No. 81 (2001).

DISCUSSION OF PROCEDURAL ISSUES

The original petition, filed on May 8, 2001, contained inaccurate descriptions of the present and proposed units. Specifically, the petition did not reflect that the unit represented by CWA was Employer-wide and covered employees in dozens of classifications in two states. Rather, from the original petition it appeared that Consumer Market Group employees alone composed the CWA-represented unit. On the first day of hearing, August 20, 2001, Petitioner acknowledged that the current unit it represents includes 47,000 employees, most of whom are not part of the Employer's Consumer Market Group. Thereafter, on September 5, 2001, the third

day of hearing, Petitioner actually amended its petition to reflect that it was seeking to accrete all TIU-represented CMG employees to its Employer-wide unit.

In certain instances where a petition is amended an issue arises as to whether the original date of filing or the date of amendment should control. Where a petition is amended, and the amendment substantially enlarges the unit's character or the size, or the number of employees covered, the date of the amended petition is often deemed controlling. *Hyster Co*., 72 NLRB 937 (1947). This issue is most relevant where there is an assertion of contract bar. Here, by September 5, 2001, when the petition was amended, both Unions had entered into successive collective bargaining agreements with the Employer. Therefore, TIU contends that the instant petition must be dismissed because it was originally defective and upon amendment it was untimely. This argument is not persuasive. First, the doctrine of contract bar applies to representation petitions. Contract bar does not apply to unit clarification petitions. The Board explained in *Edison Sault Elec. Co*., 313 NLRB 753 (1994), ". . . even a written executed contract is not necessarily a bar to the filing of a UC petition - for example, where the classification is newly created, or otherwise not clearly covered by the contract." (citations omitted). In a UC proceeding, where the parties have reached an agreement, the Board is mindful of the inherent disruption of midterm contract modifications. This particular concern may be distinguished from the rationale behind the doctrine of contract bar *i.e*., discouraging protracted litigation. Second, the petition was amended early-on and, as a practical matter, there was never any confusion among the parties regarding its intent. Accordingly, I find that no party has been prejudiced or denied due process. I, therefore, reject TIU's position that the instant petition be dismissed on purely procedural grounds.

DISCUSSION OF SUBSTANTIVE ISSUES

Board law is clear with regard to proper invocation of the unit clarification process: it is appropriate for resolving ambiguities concerning the unit placement of individuals in newly created classifications; and, it is appropriate where an existing classification undergoes recent and substantial changes, thereby giving rise to a question of whether the individuals in said classification should continue to be included in or excluded from the bargaining unit. Unit clarification is inappropriate for upsetting an agreement between a union and an employer or an established practice of such parties concerning the unit placement of individuals. *Union Elec. Co*., 217 NLRB 666, 667 (1975).

Unit clarification is but one method whereby the Board may resolve issues of accretion. Simply stated, accretion cases, which are often quite complex, pose the question of whether one group of employees should be added to another existing unit by operation of law or administrative determination. While a disputed, newly-established classification or a recent and substantial change in circumstances may trigger an accretion, the Board has held that unit clarification may not be used to accrete to a unit an employee classification which historically has been excluded from the unit. *Id*. Traditionally, the Board has applied the doctrine of accretion sparingly and restrictively because it denies the affected workers their right to select their own bargaining representative, a right most central to the National Labor Relations Act. *United States Steel Corp*., 280 NLRB 837 (1986); *Melbet Jewelry*, 180 NLRB 107 (1969).

In determining whether a valid accretion exists the Board examines: interchange between the two groups of employees, common supervision, similarity of terms and conditions of employment, similar duties, functional integration. Such criteria are all factors considered in the requisite community of interest analysis. *Pergament United Sales, Inc*., 296 NLRB 333, 344

(1989); *citing Compact Video Services*, 284 NLRB 117 (1987). Other vital factors the Board considers in accretion cases are bargaining history and historical exclusion. *Robert Wood Johnson Univ. Hosp*. 328 NLRB 912, 914 (1999); *United Parcel Serv*., 303 NLRB 326, 327 (1991).

The Board is hesitant to clarify bargaining units during the term of a collective bargaining agreement that clearly defines the bargaining unit. *Wallace-Murray Corp*., 192 NLRB 1090 (1971). As the Board noted in *Edison Sault Elec. Co*., *supra*, "to permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition." This would be unnecessarily disruptive of an established bargaining relationship. *San Jose Mercury News*, 200 NLRB 105 (1972). In some limited circumstances, however, the Board may find that the interests of stability are better served by entertaining a unit clarification petition during the term of a contract. As such, on occasion the Board has processed a unit clarification petition shortly after a contract is executed absent evidence that the petitioner abandoned its request in exchange for contract concessions. *St. Francis Hosp*., 282 NLRB 950 (1987). However, even where a petitioner is able to establish a *bona fide* reservation of its right to file for clarification, when the employees have been historically excluded from the unit, the Board has found that petitioner has waived its right to pursue unit clarification. *Robert Wood Johnson Univ. Hosp*., *supra*. Indeed, the Board does not normally use its power to police its certifications to include in a unit by way of clarification classifications or categories of employees who historically have been excluded. *Plough Inc*., 203 NLRB 818 (1973). Further, the Board has long held that when parties to a bargaining relationship have excluded a group of employees from an established bargaining unit, the Board will not clarify the unit to include

those employees unless substantial, recent changes have created a compelling case for accretion. *Gitano Group*, 308 NLRB 1172 n. 10 (1992).

In certain respects the instant case is not a traditional accretion case where one employer takes over an operation owned by another employer and the issue is whether the employer's new employees should be accreted to the existing unit. For here, historically the Employer has had two separate bargaining units of employees performing the same function.

In the instant case, CWA and TIU have both historically represented residential service representatives and the smaller group of staff associates. As mentioned above, this is an outgrowth of the way in which they organized and were certified *i.e.*, on a facility-by-facility basis.[11]/ Moreover, the Employer, a mammoth public utility company, has always maintained a highly centralized and uniform corporate and administrative structure with regard to its operations and its employees. Indeed, from the beginning and continuing on to the present, the two classifications at issue here have performed substantially similar work under substantially similar working conditions. Accordingly, there is a substantial community of interest between the employees that CWA seeks to represent and those employees that TIU represents. While I note that there are limited variations in the two units' terms and conditions of employment, they exist as a result of the Employer's adaptation to a blended working environment and, to a lesser extent, the parties' collective bargaining agreements.

For more than 20 years, these two bargaining units, represented by two unions have been performing the same work. Moreover, at five locations in northern California, the two

---

[11]/ As previously stated, in its brief, CWA argues that the TIU-represented unit is an inappropriate unit because its existence is based upon the extent of employees' organization. In a related argument, citing *PECO Energy Co.*, 322 NLRB 1074 (1997), CWA argues that the Board eschews fragmentation of units among public utilities. First, I note that the general rule in favor of systemwide units has not operated as an absolute prohibition of smaller units at public utilities. *Id*. at 1080. Second, I find these arguments bear more upon proceedings involving petitions for elections where there is little or no evidence of bargaining history.

bargaining units have worked at the same facilities. The five integrated facilities resulted after the Employer consolidated and combined offices where the TIU and the CWA-represented residential service representatives worked. Although employees from the two units may work in the same facilities, generally they do not share on-site supervision. There is no involuntary transfer between the two units and an employee's voluntary transfer is predicated on a voluntary change in union affiliation.

CWA asserts that dealing with these parallel units has created unworkable difficulties for the parties, specifically the Employer, and the employees. When considered in its entirety, and particularly in view of the breadth of the work and number of individuals involved here, the record fails to support CWA's claim. Rather, the record demonstrates that through the years the two units have caused the Employer, the employees and the Unions inconvenience. Where there was a real doubt regarding representation, the Employer filed RM petitions. Issues involving work assignment have been resolved short of arbitration. In 1998, there was a one-day strike by the TIU-represented employees, which some CWA-represented workers elected to honor. Besides being an isolated event, the record reveals that it caused no disruption to the customers' services or the Employer's business. Furthermore, contrary to the circumstances of *U.S. West Communications, Inc*., 310 NLRB 854 (1993), where the employer was the petitioner, here the Employer has not raised the issue of business hardship or interference with labor relations. Rather, the Employer has declared its neutrality, electing not even to file a post-hearing brief.

More than a decade ago new computer technology enabled the Employer to change its system of servicing customers. Historically what had distinguished the two units were their locations and the areas they serviced. However, since about 1989 geographic proximity no

longer determines the identity or location of the residential service representative with whom the customer interacts. In turn, no longer do members of a particular bargaining unit service set geographic areas. And, no longer is the Employer able to segregate the work by bargaining unit. Instead, via computerized switches that were installed in about 1989, customers' calls are routed to provide the quickest possible response. When the Employer implemented this new system in 1989, it informed both CWA and TIU.

Thereafter, in 1993, the Employer and TIU entered into an agreement whereby 30 percent of all residential service representatives would categorically remain in the TIU-represented unit. This agreement, which remains in effect today, recognized the existence of two co-extensive bargaining units.

In 1997, about five years ago, the Employer installed its most recent technological change, TotalNet, an added layer of capability to its computerized call routing system. TotalNet was implemented shortly before CWA and TIU entered into their MOU and attempted unsuccessfully to effectuate a merger. So too, TotalNet preceded the Employer's unfair labor practice litigation relative to the Unions' MOU. There, the Board concluded that the Employer had violated Section 8(a)(5) by refusing to bargain with TIU. *Pacific Bell*, 330 NLRB No. 31 (1999). In August 2001, after CWA had filed the instant clarification petition, the United States Court of Appeals for the District of Columbia Circuit enforced the Board's order. *Pacific Bell v. NLRB*, 259 F.3d 719, 168 LRRM 2032 (DC Cir. 2001).[12]/ Therein, the Court required the Employer to bargain with TIU.

CWA asserts that the Employer's technological changes have established a proper basis for accretion. However, based on the record, I find that there have been no recent sub-

stantial changes in the work performed by the TIU-represented employees. In this regard, and as set forth above, the most recent changes occurred five years ago when TotalNet was introduced. Accordingly, cases where the Board has deemed unit clarification appropriate because historically excluded classifications have undergone recent, substantial changes do not apply to the instant case. See, *Southwestern Bell Tel. Co*., 254 NLRB 451 (1981); *Indiana Bell Tel. Co*., 229 NLRB 187 (1977).

In *U.S. West Communications Inc., supra,* the Board affirmed a regional director's decision that the employer's technological and organizational changes had created circumstances such that 500 ORTT-represented long distance telephone technicians,[13]/ who worked in three states, were properly accreted into a 14-state bargaining unit represented by CWA. While, at first, the facts of *U.S. West* appear to resemble the facts of the instant case, the two cases are readily distinguishable. In *U.S West*, the employer came into existence in the 1980's after the AT&T divestiture. There, the employer was formed as the result of the consolidation of three companies, including Pacific Northwest Bell ("PNB"). Before said consolidation, PNB's territory consisted of Washington, Oregon and northern Idaho. Unlike most of the other telephone companies,[14]/ PNB owned, operated and maintained its own long distance or "toll" equipment and facilities.

At PNB, technicians represented by ORTT had historically provided and maintained long distance lines. CWA-represented technicians had provided and maintained local

---

[12]/ From the content of both the Board and the Circuit's decisions, it does not appear that the Employer/Respondent proffered accretion as a defense to the unfair labor practice allegations.

[13]/ ORTT is the abbreviation for Order of Repeatermen and Toll Testboardmen, another labor organization that represents employees in the telephone and telegraph industry.

[14]/ AT & T Long Distance provided this service for most of the other telephone companies, including the Employer herein.

lines. From their original dates of certification in the 1940's and for some time thereafter, each group received specialized training because each bargaining unit relied on different technology.

After PNB and the two other companies were consolidated, new technology was developed eliminating the distinction between long distance and local transmissions. With the advent of this new technology came remote testing; previously, testing had to take place near the equipment being tested. This substantial change eradicated the historical distinction between toll and local work and blurred the distinction between the two bargaining units. In addition, the employer's consolidation had created a different operational and administrative structure.

The facts of the instant case are different: historically and continuing to date, the residential service representatives represented by TIU and CWA have always performed the same work, required the same skills, received the same training. Even with the advent of advanced technology, this continues glaringly to be the case. Thus, here I find the importance of the parties' bargaining history and the historical exclusion of the TIU-represented unit are far more cogent than they were in *U.S. West*. Additionally, in *U.S. West* unit clarification did not disrupt the parties' collective bargaining agreements. The collective bargaining agreement between the employer and ORTT had expired.

Lastly, Susan Crutcher, the Employer's chief negotiator, testified that in 2001 when CWA and the Employer negotiated their current collective bargaining agreement, CWA representatives said ". . . . they wanted to represent everybody, including ORTT, non-represented employees and TIU, as well as people who were working in subsidiaries who were non-represented." When asked how the Employer responded to CWA's expressed desire to represent all non-CWA-represented workers, including those employees represented by TIU, Ms. Crutcher testified, "I think we laughed." While CWA submitted a written proposal to the Employer

requesting to represent subsidiaries' employees, CWA did not submit anything in writing requesting to represent any of the Employer's workers, including those at issue here. According to Ms. Crutcher, it was clear to CWA during negotiations that the Employer was unwilling to negotiate or agree to the accretion of the TIU-represented unit.

Where a party executes a collective bargaining agreement, the absence of an explicit reservation by a petitioner of its right to pursue the issue of unit clarification does not constitute a waiver of this right. *St. Francis Hosp. supra*. Moreover, from the instant record it appears that CWA has historically and immutably asserted its right of accretion. I am, nonetheless, concerned by the facts presented here; specifically, as to whether CWA has established with legal sufficiency a reservation of rights such that the Board should consider mid-term disruption of not one but two extant collective bargaining agreements. In this regard, the record does not establish that CWA unequivocally addressed its intent to pursue accretion of the TIU-represented workers at issue here. Rather, it appears that the issue was part of broader and highly informal discussion. In short, although my ultimate conclusion does not rest upon the potential insufficiency of CWA's conduct during recent negotiations with the Employer, the facts relating to this issue appear inconsistent with the Act's primary purpose: to maintain the stability of collective bargaining relationships.

CONCLUSION

In light of the above, based upon the record and application of current Board law, I do not find clarification of the bargaining unit to be appropriate. In this regard, I find that here the parties' bargaining history, the lack of recent substantial change in the work, and the fact of historical exclusion are determinative and controlling. Unit clarification would thwart the purposes of the Act.

Accordingly, clarification of the bargaining unit is not warranted.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of § 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington, D.C. by February 22, 2002.

Dated at Los Angeles, California this 8th day of February, 2002.

/s/ Byron B. Kohn
Byron B. Kohn, Acting Regional Director
National Labor Relations Board
Region 31
11150 West Olympic Boulevard, Suite 700
Los Angeles, CA 90064-1824

385 7501 2500; 385 7501 2593
385 7533 2020